Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Complete Detariffing for	)	
Competitive Access Providers and	)	CC Docket No. 97-146
Competitive Local Exchange Carriers	)	
	)	

JOINT COMMENTS OF MGC COMMUNICATIONS, INC. d/b/a/ MPOWER COMMUNICATIONS CORP., ITC^DELTACOM, INC. AND BROADSTREET COMMUNICATIONS, INC.

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Dated: July 12, 2000

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SUMMARY

The Commission must continue to apply its permissive detariffing policy to nondominant providers of interstate exchange access services. The benefits of a permissive detariffing policy, including reduced administrative and transactional costs, are well documented. Mandatory detariffing for these services is not in the public interest, and will have several adverse effects on the ability of CLECs to compete in local markets.

The recent imposition of mandatory detariffing for interstate, domestic, interexchange services of nondominant interexchange carriers should not lure the Commission into hastily adopting mandatory detariffing for interstate exchange access services, particularly since CLEC access charges are steadily declining and are not a pervasive problem in today's marketplace. Regulatory action by way of mandatory detariffing is therefore premature and wholly inappropriate.

The Commission should first address the far more critical problem of refusal by IXCs to pay tariff access charges and other impermissible self-help market abuses. This is evidenced by the costly and time-consuming litigation required for CLECs to collect access charge payments, even under a permissive detariffing regime. In this regard, any fear concerning possible abuse of the filed rate doctrine is far outweighed in today's exchange access market by the exercise of impermissible self-help on the part of major IXCs in refusing to fairly compensate CLECs for their costs in providing exchange access services.

Accordingly, Mpower, ITC^DeltaCom and BroadStreet strongly urge the Commission to retain the permissive detariffing policy adopted in *Hyperion* and to apply it to all nondominant CLECs and nondominant providers of interstate exchange access services.

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MGC Communications, Inc. d/b/a Mpower Communications Corp. ("Mpower"), ITC^DeltaCom, Inc. ("ITC^DeltaCom"), and BroadStreet Communications, Inc. ("BroadStreet") (collectively, the "Joint Commenters"), by their undersigned attorneys, hereby submit these Comments in response to the Public Notice in the above-referenced dockets.[1/]

I. INTRODUCTION

Mpower is a facilities-based broadband communications provider offering a full range of data, telephony, Internet access and Web hosting services for small and medium-size business customers throughout the United States including, California, Florida, Georgia, Illinois, and Nevada. Mpower recently acquired ownership and control of Primary Network Holdings, Inc. and its operating affiliates, thereby expanding its operations in the Midwest and other states.

1/ *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, Public Notice, CC Docket Nos. 96-262 and 97-146, DA 00-1268 (rel. June 16, 2000) ("*Public Notice*").

ITC^DeltaCom is a full service telecommunications provider, serving business customers throughout the Southeastern United States. Utilizing an approximately 8,320 mile fiber optic network, and switching infrastructure, ITC^DeltaCom combines facilities-based long distance, local services, data and Internet network services, and customer telephone equipment as a bundled package of telecommunications products.

BroadStreet is an integrated communications service provider for small and medium businesses in the Mid Atlantic and Southeastern states. Focusing on underserved markets, BroadStreet delivers a comprehensive suite of communication services including local and long-distance voice, high-speed data, Internet, and application services over its high-speed broadband network.

Mpower, ITC^DeltaCom, and BroadStreet have an active interest in the tariffing requirements imposed on their respective competitive local exchange and exchange access services.

II. BACKGROUND

In its Public Notice, the Commission invites parties to update and refresh the record of the above-captioned proceedings with respect to the mandatory detariffing of competitive local exchange carrier ("CLEC") interstate access services.[2/] The Commission released the Public

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[2/] Specifically, the Public Notice requests commenters to discuss whether and, if so, how mandatory detariffing: (1) addresses any market failure to constrain terminating access rates; (2) provides a market-based solution to excessive terminating charges by encouraging parties to negotiate terminating access charges; (3) provides the same benefits identified in the *Hyperion Order and NPRM* (cited *infra* at n. 4) for permissive detariffing; (4) precludes the use of the filed

Notice following the April 28, 2000 decision by the U.S. Court of Appeals for the D.C. Circuit affirming the Commission's 1996 order requiring mandatory detariffing for interstate, domestic, interexchange services of nondominant interexchange carriers.[3/] As a result of the Court's decision, by January 31, 2001, all interexchange carriers (IXCs) are expected to have cancelled their tariffed rates for domestic interstate long distance services and to make rates for those services publicly available on their Internet web sites if such sites are available.

Notwithstanding the recent imposition of mandatory detariffing for interstate, domestic, interexchange services of nondominant interexchange carriers, the permissive detariffing policy adopted in *Hyperion* must continue to apply to the provision of interstate exchange access services by competitive local exchange carriers.[4/] The public interest considerations acknowledged by the Commission as part of its analysis under Section 10 of the

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rate doctrine to nullify contractual arrangements; (5) reduces the administrative burden on the Commission of maintaining tariffs; and (6) reduces the economic burden on the non-ILECs of filing tariffs. *See* Public Notice at 2.

3/ *MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000); *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) (*IXC Detariffing Order).* On May 1, 2000, the court lifted the stay for the *IXC Detariffing Order* and the rules adopted in the order became effective. *MCI WorldCom v. FCC*, No. 96-1459, slip op. (D.C. Cir., May 1, 2000).

4/ *See Hyperion Telecommunications, Inc. and Time Warner Petitions for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997) (*Hyperion Order and NPRM).*

Communications Act of 1934, as amended (the "Act"),[5/] continue to apply in today's local exchange access marketplace. Accordingly, the Commission must maintain its current policy of permissive detariffing. Unlike business and residential consumers of long distance service impacted by the IXC detariffing proceeding, consumers of exchange access services are principally other carriers, including major IXCs. These carrier-consumers of exchange access services have demanded a permissive detariffing regime in the past, and for good reason. They recognize that mandatory detariffing would require CLECs and competitive access providers ("CAPs") to renegotiate customer contracts despite their limited market share and resulting lack of bargaining power. It will also impose significant administrative costs on new entrants as they attempt to expand service offerings to a broader customer base. The record since the Commission's *Hyperion* decision confirms that any fear concerning possible abuse of the filed rate doctrine is far outweighed in today's exchange access markets by the exercise of impermissible self-help on the part of major IXCs in refusing to fairly compensate smaller new entrants for their costs in providing exchange access services. Accordingly, Mpower, ITC^DeltaCom and BroadStreet strongly urge the Commission to retain the permissive

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[5/] Section 10 requires the Commission to forbear from applying any provision of the Communications Act if it determines that: (1) enforcement is not needed to ensure that carrier undertakings are consistent with Section 202(a) and 201(b) of the Act; (2) enforcement is unnecessary to protect consumers; and (3) forbearance would be consistent with the public interest. In making the public interest determination, Section 10 requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services. *See* 47 U.S.C. §160.

detariffing policy adopted in *Hyperion* and to apply it to all nondominant CLECs and nondominant providers of interstate exchange access services.

III. DISCUSSION

A. MANDATORY DETARIFFING AS A MARKET-BASED SOLUTION TO EXCESSIVE TERMINATING CHARGES IS A "CART-BEFORE-THE-HORSE" APPROACH TO A PROBLEM THAT DOES NOT EXIST

Before addressing the question of whether mandatory detariffing is a "market-based solution to excessive terminating charges"[6/], it is first necessary to address in the Commission's Public Notice the underlying presumption that excessive terminating charges are a pervasive problem in today's marketplace. The Joint Commenters contend, contrary to the presumption implied in the Public Notice, that CLEC exchange access rates have not been, and are unlikely to be, excessive or unreasonable. The trend is for CLEC exchange access rates to be declining, not increasing, as costs for these new entrants will decrease as other factors, such as market share, numbers of customers, and traffic volume, continue to increase. Moreover, this trend is occurring under the existing permissive detariffing regime, and without any benchmarking of CLEC access charge rates.[7/] The Commission has recognized, all other factors being equal, that

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[6/] *See* Public Notice at 2.

[7/] The Commission is currently considering possible benchmarking of CLEC access charge rates in its *Access Charge Reform* docket. In that proceeding, Mpower supported ALTS' proposed benchmark rate at which a CLEC rate is presumed reasonable if it is at or below the benchmark. *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*1999 Access Charge Reform Proceeding*).

larger carriers will typically have lower unit costs for switching than smaller carriers because of scale economies.[8/] As Mpower stated in its previous Comments, the Commission must recognize that CLECs will have somewhat higher switching costs than more established companies until local competition begins to take hold.[9/]

Moreover, rejecting the oft-made argument of Sprint and other major IXCs that the ILEC rate is, or should be, the *per se* reasonable rate for competitive LEC access charges, the Commission has rejected a *per se* rule that a CLEC access rate higher than the ILEC's is necessarily unjust and unreasonable under Section 201(b), 47 U.S.C. §201(b).[10/] Indeed, it could well be argued that the more pervasive, significant problem is not whether the exchange access rates of CLECs who currently control only 2-5% of the access market[11/] are excessive, but

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[8/] "The Commission has recognized that smaller telephone companies have higher local switching costs than large incumbent local exchange carriers (ILECs) because the smaller companies cannot take advantage of certain economies of scale." *National Exchange Carrier Assn., Inc. Proposed Modifications to the 1998-99 Interstate Average Schedule Formulas*, 13 FCC Rcd 24225, 1998 FCC LEXIS 6539 (Dec. 22, 1998) at n. 6.

[9/] Comments of MGC Communications, Inc. at 5 (filed October 29, 1999 in response to *Access Charge Reform*, CC Docket No. 96-262, *Fifth Report and Order and Further Notice of Proposed Rulemaking* (FCC 99-206, rel. Aug. 27, 1999)).

[10/] *Sprint Communications Company v. MGC Communications, Inc.* File No. EB-00-MD-002 at 6 (rel. June 9, 2000); *Sprint Communications Company L.P. v. FCC*, No. 00-1260 (D.C. Cir. June 20, 2000).

[11/] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order);AT&T Corp. v. Iowa Utils. Bd.,* 119 S.Ct. 721 (1999).

whether major IXCs who control 80% or more of the interstate, interexchange markets can: (1) unilaterally decide what CLEC access rates should be; (2) exercise impermissible self-help in refusing to pay tariffed rates while vigorously enforcing the filed tariff doctrine as to their own customers; and (3) require CLECs to repeatedly litigate to collect tariffed access charges.

Consequently, as a threshold matter, the Commission has not determined that excessive terminating charges is the pervasive problem that major IXCs would have the Commission believe. The Commission therefore should not undertake any regulatory action to control CLEC access rates without first finding that such access rates are excessive, and will continue to be excessive under existing market forces. Further, the Commission's pending consideration of benchmarking of CLEC access rates must take precedence before mandatory access detariffing is considered. The impact of any CLEC access benchmarking on the access markets should be fully evaluated before new entrants are left without any protections of the filed tariff doctrine in a market in which they possess only a small market share.

The far more critical problem which the Commission must address is the attempt of major IXCs to wield their greater collective power to push CLEC access rates below cost. As Mpower and other CLECs have documented, they have attempted to negotiate mutually acceptable, arms length agreements with their major IXC customers without success. Thus, mandatory detariffing as a market solution without reasonable benchmarking of CLEC access rates and other payment guarantees will stifle access competition, as CLECs are unable to recover their costs in negotiations with major IXCs due to unequal bargaining power. Repeated

litigation has been necessary to recover payment of CLEC access charges to recover payment, notwithstanding a 1999 Commission decision critical of "impermissible self help" pressures by a major IXC in refusing to pay tariffed rates.[12/] Mandatory detariffing would only serve to bolster the strong-arm tactics currently used by major IXCs of simply refusing to pay valid tariffed rates for access services provied to them.[13/]

Moreover, AT&T, Bell Atlantic, BellSouth, GTE, SBC and Sprint, have collaborated as the Coalition for Affordable Local and Long-Distance Service ("CALLS"), which in its modified plan provides for a $2.1 billion reduction in per minute switched access charges, and also seeks reductions in special access rates.[14/] Under existing rules, the Commission regulates interstate access charge levels through a price cap mechanism adjusted by inflation and an annual

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12/ *See MGC Communications, Inc. v. AT&T Corp.*, File No. EAD-99-002 (rel. Dec. 28, 1999) (affirming *MGC Communications, Inc. v. AT&T Corp.*, File No. EAD-99-002, DA 99-1395 (rel. Jul. 16, 1999)) ("*MGC v. AT&T*"); *Sprint v. MGC, appeal docketed*, No 00-1260 (D.C. Cir.)(June 20, 2000), *See also MGC Communications, Inc. v. Sprint Communications Company, L.P.*, File No. EB-99-MD-033 (filed Dec. 9, 1999) (complaint pending); *see also Advamtel, LLC d/b/a Plan B Communications, Business Telecom, Inc. d/b/a BTI Telecommunications Services, Commonwealth Telephone Enterprises, CTSI, Inc., e.spire Communications, Inc. f/k/a American Communications Services, Inc., Fairpoint Communications Corp., Focal Communications Corp., Intermedia Communications, Inc., NET2000 Communications, Inc., Sage Telecom, Inc., WinStar Communications, Inc. v. AT&T Corp. and Sprint Communications Company, L.P.*, Nos. 00-CV-643 and 00-CV-1074 (E.D. Va.)(filed April 17, 2000) (seeking to recover unpaid access charges).

13/ A carrier's refusal to pay tariffed switched access charges is impermissible self-help and a violation of section 201(b) of the Act. *See MGC v. AT&T Corp.*, File No. EAD-99-002 (rel. Dec. 28, 1999).

14/ *See Memorandum in Support of the Revised Plan of the Coalition for Affordable Local and Long Distance Service ("CALLS")*, CC Docket Nos. 94-1, 96-45, 99-249, and 96-262 at 2 (filed Mar. 8, 2000).

productivity offset. The productivity offset is known as the "X-factor." The CALLS plan imposes a ceiling of 6.5 % on the X-factor in hopes or reaching target rates for local switching and switched transport.[15/] With the exception of X-factor reductions related to special access, X-factor reductions will be targeted to reduce switched access usage rates to $0.0055 for the Bell Companies and GTE, and $0.0065 for the other price cap incumbent LECs.[16/] Since the ILEC members of CALLS control the vast majority of the access market, the rate caps to which they have agreed will certainly gravitate downward the access rates of even non-member competitive local exchange carriers. This may force CLEC and CAP service providers to eventually succumb to rates that are not true to cost.

Even if downward-trending CLEC terminating access rates were excessive, IXCs have an available and effective remedy under the Commission's formal complaint procedures.[17/] As the Commission stated in *Hyperion*, "if access providers' service offerings violate Section 201 or Section 202 of the Communications Act, we can address any issue of unlawful rates through the exercise of our authority to investigate and adjudicate complaints under Section 208."[18/] As Mpower can attest, the Commission has already done so, considering whether Mpower's access

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15/ *Id.* at 11.

16/ *Id.* at 4.

17/ *See* 47 U.S.C §208.

18/ *Hyperion Order* at 25.

rates are just and reasonable.[19/] Mandatory detariffing should not be viewed as a remedy for IXCs challenging certain access rates, nor should the permissive detariffing policy be interrupted before the interstate access markets are fully competitive.

B. PERMISSIVE DETARIFFING OF CLEC INTERSTATE ACCESS SERVICES SHOULD BE MAINTAINED AS THE BETTER POLICY FOR ACCESS MARKETS

Quite unlike interexchange customers in the *IXC Detariffing Proceeding*, consumers of access services strongly favor a policy of permissive detariffing for exchange access services. Specifically, AT&T and WorldCom (f/k/a MCI) both opposed mandatary detariffing in the underlying rulemakings.

MCI argued:

> MCI believes that, given the nature of the carriers seeking not to have to tariff, the nature of their services, and their customer base, a sound case can be made for tariffing forbearance for them under the 1996 Act. However, as noted herein, such forbearance lawfully can mean only permissive detariffing, not mandatory detariffing, and the Commission should use this proceeding to sustain its decision that permissive detariffing for CLECs/CAPs will serve the public interest.[20/]

Similarly, AT&T argued:

> Because it offers no countervailing benefits that could not be achieved through permissive detariffing, *there is no basis to*

19/ *See e.g., Sprint v. MGC, appeal docketed*, No. 00-1260 (D.C. Cir. June 20, 2000).

20/ MCI Comments at 10 (filed Aug. 8, 1997 in response to *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CCB/CPD No. 96-3, Notice of Proposed Rulemaking (rel. June 19, 1997).

> *subject CLECs to the costs and competitive disadvantages associated with mandatory detariffing of access services.* Indeed not only do all CLECs oppose mandatory detariffing, but no IXCs – who would presumably be the beneficiaries of such a policy-- support it either.[21/]

The Commission should give great deference to these Comments and not be swayed into adopting a mandatory detariffing policy which the record and the industry do not support.

The record clearly establishes the benefits of permissive detariffing for exchange access services. As the Commission recognized in *Hyperion*, tariff filings can help access providers reduce transaction costs and these savings may be passed on to the consumer by obviating the need for individual contracts where a particular service or certain terms and conditions may be standardized. Rather than contracting individually with each customer, exchange access providers can provide certain services by tariff.[22/] Permissive detariffing permits exchange access carriers to react to changes in the market and initiate new products and services without having to renegotiate every contract. Mpower, ITC^DeltaCom, and BroadStreet agree that permissive detariffing permits exchange access providers to take advantage of the most efficient mix of tariff and contracting methods with each of their customers.

[21/] AT&T Reply Comments at 7 (filed Aug. 8, 1997 in response to *Hyperion Telecommunications, Inc. Petition Requesting Forbearance*, CCB/CPD No. 96-3, Notice of Proposed Rulemaking (rel. June 19, 1997) (emphasis added).

[22/] *Hyperion Order* at 16.

In contrast, mandatory detariffing will require significant administrative costs to renegotiate rates for services previously adopted in FCC tariffs. As Mpower's fruitless contract negotiations with Sprint have demonstrated, there is a substantial transaction cost associated with contract negotiation.[23/] That cost is exceedingly high even under a permissive detariffing regime where a filed tariff exists. Certain major IXCs will attempt to dictate terms, refusing to enter into any contract that is for a rate higher than existing ILEC rates. Even under permissive detariffing, Mpower and many other CLECs have been forced at great expense to litigate to collect payment of their tariffed access charges. Even where there are valid and lawful filed rates, certain customers will not willingly comply with filed tariff rates and terms. Yet permissive detariffing and its attendant expense is far preferable to contract negotiation without bargaining power. Thus, maintaining a permissive detariffing policy is essential protection for CLECs and CAPs and their customers as they seek to grow their businesses and gain market share.

C. CLEC AND CAP ABUSE OF THE FILED RATE DOCTRINE IN CARRIER-TO-CARRIER SERVICE ARRANGEMENTS IS A MYTH

Partly at issue in maintaining a permissive detariffing policy for exchange access providers is the applicability of Section 203(c) and judicial precedent addressing the filed rate doctrine.[24/] Section 203(c) provides that a carrier may not "charge, demand, collect, or receive a greater or less or different compensation . . .than the charges specified in the schedule in

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23/ *See* MGC's Opposition Brief at 11 in File Nos. EB-99-MD-033 and EB-MD-00-002 (filed Mar. 10, 2000).

24/ *See e.g., AT&T v. Central Office Telephone, Inc.,* 118 S.Ct.1956, 1963 (1998).

effect."[25/] The underlying assumption is that carriers unilaterally alter contractual terms to the detriment of customers, using the filed-rate doctrine as a shield. Unlike customer relationships in the interstate, interexchange market, such abuses do not typically occur in carrier-to-carrier business arrangements. The assumption that exchange access providers use the filed tariff doctrine as a sword is a myth – if anything the filed tariff doctrine operates as a shield for these providers to protect them from the abusive policies of major IXCs. As stated above, major IXCs often use impermissible self-help mechanisms, rather than compensate exchange access providers fairly for their services. Contract negotiations with these customers are often fruitless and lead to expensive and time consuming litigation. At the very least, exchange access providers retain some leverage in knowing that the filed rate is enforceable against renegade IXCs.

IV. CONCLUSION

The Commission should continue to apply its permissive detariffing policy to nondominant providers of interstate exchange access services. A policy of mandatory detariffing will impose significant and immediate financial costs upon the Joint Commenters and other CLECs by jeopardizing their ability to recover access costs due to unequal bargaining in contract negotiations with major IXCs. This in turn could have the unintended consequence of impeding CLECs' ability to provide innovative services at competitive prices. The Joint Commenters, therefore, respectfully request the Commission to continue to allow nondominant providers of

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25/ 47 U.S.C.§ 203(c).

interstate exchange access services the flexibility to continue to file their interstate access tariffs with the Commission and negotiate intercarrier contracts where business and market forces permit. Such a policy is in the public interest and fully consistent with the Commission's forbearance authority under Section 10 of the Communications Act, as amended, 47 U.S.C. §160.

Respectfully submitted,

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Dated: July 12, 2000

CERTIFICATE OF SERVICE

I, Sana D. Coleman, do hereby certify that on the 12th day of July, 2000, a copy of the foregoing **JOINT COMMENTS OF MGC COMMUNICATIONS, INC. d/b/a/ MPOWER COMMUNICATIONS CORP., ITC^DELTACOM, INC. AND BROADSTREET COMMUNICATIONS, INC.** was caused to be served, by hand-delivery upon the following:

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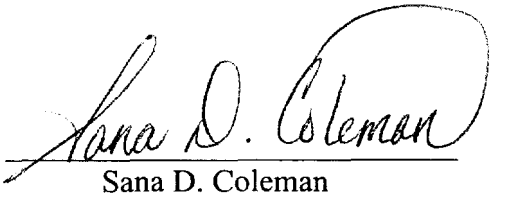

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